Marquette Law Review

Volume 93
Issue 2 *Symposium: Criminal Appeals: Past, Present, and Future*

Article 14

Appellate Review of Sentencing Policy Decisions After *Kimbrough*

Carissa Byrne Hessick

APPELLATE REVIEW OF SENTENCING POLICY DECISIONS AFTER *KIMBROUGH*

CARISSA BYRNE HESSICK*

I. INTRODUCTION

The United States Supreme Court drastically altered appellate review of federal sentencing decisions in *United States v. Booker*.[1] *Booker* held that the once-mandatory Federal Sentencing Guidelines are now advisory, and it instructed the appellate courts to review all district court sentencing decisions for "reasonableness"—a virtually unknown standard of appellate review.[2] After the decision in *Booker*, several circuit splits developed over how to conduct this new form of appellate review, and the Court heard a series of cases to resolve these conflicts. One of these post-*Booker* cases, *Kimbrough v. United States*,[3] involved a district court's authority to sentence a defendant outside of the Guidelines range based on a categorical disagreement with the policy underlying the crack cocaine Guideline. Although obviously intended to clarify appellate review, the Court's opinion in *Kimbrough* has actually led to additional confusion and created new circuit conflicts.[4]

The Court's recent federal sentencing cases, beginning with *Booker*, resemble a tightrope act: The Court is endeavoring to walk a fine line between district court sentencing discretion and preserving some adherence to the Guidelines through appellate review.[5] Because appellate review is, by its terms, a limit on district court discretion, the Court's post-*Booker* sentencing jurisprudence is inherently contradictory.[6] The Court has tried to ensure that

---

* Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. J.D., Yale Law School. B.A., Columbia University. Thank you to the participants and attendees at the Criminal Appeals: Past, Present, and Future Conference, which Marquette University Law School hosted on June 15 and 16, 2009. Thanks also to Jelani Jefferson Exum, Andy Hessick, Mary Sigler, Judy Stinson, and Doug Sylvester for their helpful comments on this project, and to Amy Coughenour for her research assistance.

1. 543 U.S. 220 (2005).

2. *Id*. at 245, 261.

3. 552 U.S. 85 (2007).

4. *See The Supreme Court, 2007 Term: Leading Cases*, 122 HARV. L. REV. 276, 327 (2008) [hereinafter *Leading Cases*] ("*Kimbrough* . . . illustrated and arguably increased the post-*Booker* tension between mandatory and indeterminate sentencing.").

5. *See id*. at 330 (noting "the tension between mandatory and advisory sentencing created by the *Booker* remedy").

6. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 29 (2008) ("The *Booker* remedy is fundamentally schizophrenic in that it attempts to increase district court discretion in order to avoid Sixth Amendment problems, but at the same time it

district courts continue to sentence according to the Guidelines, but at the same time it has said that the Guidelines are not mandatory. To date, the Court has attempted to ensure district court compliance with the Guidelines through appellate review.[7] But, because strict appellate review would ultimately eliminate district court discretion, the Court has had to twist the appellate process[8] and issue opinions, like *Kimbrough*, that contain facially inconsistent statements.[9] *Kimbrough* tells appellate courts that they must allow district courts to categorically disagree with the sentencing policy underlying the crack cocaine Guideline, but it did not extend that holding to all Guidelines. To the contrary, the Court cautioned that district court disagreements with other Guidelines may be subject to "closer review" by the courts of appeals.

This language has resulted in differing approaches to other policy disagreements in the circuits. Some have essentially ignored the closer review dictum, while others have tried to determine which Guidelines are entitled to closer review—and these efforts have created additional circuit splits. Still, other appellate courts, clearly unwilling to deal with the uncertainty created by *Kimbrough*, have decided to recharacterize district court sentencing decisions as driven by case-specific factors so that they need not take a side in the developing conflicts.

The confusion after *Kimbrough* is endemic in modern federal sentencing. That the Court's opinion in a case that was designed to clarify appellate review after *Booker* has resulted in more confusion and new circuit splits is not only ironic, it also suggests that the Court's attempt to preserve the Guidelines' centrality through appellate review may ultimately be doomed to fail. This Article argues that there may be a better way to encourage district courts to sentence within the Guidelines—namely, for the United States Sentencing Commission (the Commission) to attempt to persuade district courts that the policy decisions underlying the Guidelines and the resulting sentencing ranges are appropriate. If a district court agrees with the substance of the Federal Sentencing Guidelines, then it is likely to impose a Guidelines sentence, even if it has the discretion not to do so. This approach avoids the impossible task of satisfying contradictory goals, and it should result in a more coherent law of sentencing.

---

seeks to preserve uniformity through appellate review, which by its nature is a limitation on district courts.") (footnote omitted).

7. *See Booker*, 543 U.S. at 263 (stating that "sentencing appeals . . . would tend to iron out sentencing differences").

8. *See* Hessick & Hessick, *supra* note 6, at 18–28 (detailing how the Court's post-*Booker* cases diverge from ordinary principles of appellate review).

9. *See id.* at 34–35 (noting inconsistent statements in the Court's post-*Booker* cases); *Leading Cases*, *supra* note 4, at 333 (noting "the contrast between [*Kimbrough*'s] holding and its dicta").

The Article proceeds in six parts. Part II describes the cases leading up to the decision in *Kimbrough*. Part III critiques the *Kimbrough* decision. Part IV explains how the federal appellate courts have read the *Kimbrough* opinion in different ways, giving rise to the ensuing circuit splits. Part V offers a solution to the Court's sentencing conundrum, namely that the Commission ought to promote adherence to the Guidelines by persuading district courts that the policies underlying the Guidelines are appropriate. Part VI concludes.

II. HOW THE COURT ARRIVED AT *KIMBROUGH*

Prior to 1984, federal sentencing was left almost entirely to the discretion of district court judges. District court sentencing was restricted only by the statutory maximum sentence and, for some offenses, a statutory minimum sentence; appellate review was essentially unavailable.[10] The Sentencing Reform Act of 1984 (the SRA[11]) drastically restricted the discretion of federal sentencing judges. The SRA created a sentencing commission to develop mandatory guidelines limiting available sentences in particular cases.[12] The Federal Sentencing Guidelines assigned narrow sentencing ranges within the broader statutory sentencing limits. These Guideline ranges were based on a number of variables, including the offense of conviction, the circumstances surrounding the offense, and the defendant's prior criminal convictions. Judges were permitted to sentence outside the Guideline range only in the few situations expressly permitted by the Guidelines,[13] or where the sentencing judge found "there exists an aggravating or mitigating circumstance of a kind, or to a degree, [that was] not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines that should result in a sentence different from that described."[14]

The Supreme Court dramatically changed federal sentencing practice in a series of cases interpreting the Sixth Amendment jury-trial right, which culminated in *Booker*. The first of these cases, *Apprendi v. New Jersey*, involved a state statute that increased the maximum sentence for the unlawful possession of a firearm from ten to twenty years imprisonment if the sentencing judge found that the defendant possessed the firearm to intimidate

10. Hessick & Hessick, *supra* note 6, at 4.

11. Pub. L. No. 98-473, 98 Stat. 2017 (1984) (codified as amended in scattered sections of 28 U.S.C.).

12. *See* 28 U.S.C. § 991 (2006).

13. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K (2008) (identifying appropriate and inappropriate grounds for departure).

14. 18 U.S.C. § 3553(b)(1) (2006); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 101–03 (1998) (noting, prior to *Booker*, that this provision severely hampered district court ability to depart from the Guidelines).

someone because of his or her race.[15] The *Apprendi* Court struck down the statute, stating that, other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[16] Four years after *Apprendi*, in *Blakely v. Washington*, the Court held that mandatory sentencing guidelines can violate the Sixth Amendment if a judge's sentencing discretion is limited to a range narrower than the statutory range unless the sentencing court makes particular factual findings.[17] The *Blakely* Court explained that mandatory guidelines fall within the *Apprendi* rule because "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[18]

Less than a year after deciding *Blakely*, the Court in *Booker* held that the mandatory Guidelines violated the Sixth Amendment because, in many situations, they restricted federal judges' ability to sentence above the Guideline ranges unless the judges engaged in judicial fact-finding.[19] Although the Supreme Court's previous Sixth Amendment sentencing cases required the court to abandon mandatory sentencing guidelines based on judicial fact-finding, a majority of the Court was unwilling to submit sentencing facts to juries, because it would limit the ability to sentence based on "*real conduct*"[20]—the manner in which different defendants commit the same offense in different ways. If sentencing facts had to be found by a jury, then parties would engage in plea bargaining for sentencing facts, which would seriously decrease the influence of the Federal Sentencing Guidelines.[21] Thus, instead of requiring federal prosecutors to submit sentencing enhancements to a jury,[22] the *Booker* Court adopted an unexpected remedy: The Court rendered the Federal Sentencing Guidelines advisory by severing the statutory provision making the Guidelines mandatory, and it directed district courts to impose sentences based on a balance of various

15. 530 U.S. 466 (2000).

16. *Id*. at 490.

17. 542 U.S. 296, 304–05 (2004).

18. *Id*. at 303.

19. *See* United States v. Booker, 543 U.S. 220, 245 (2005). For example, a court could increase a defendant's sentence above a particular Guidelines range if it first made factual findings regarding whether the defendant used a gun in the commission of the offense, *see, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.6 (2008), or how much economic loss the defendant caused, *see, e.g.*, USSG § 2B1.1(b)(1).

20. *See Booker*, 543 U.S. at 250.

21. *See id*. at 256. The remedial *Booker* majority also expressed concerns about the practical implementation of proving sentencing facts to juries. *Id*. at 254–55.

22. Four justices supported such a remedy. *See id*. at 272, 284–87 (Stevens, J., dissenting in part); *id*. at 313, 313 (Thomas, J., dissenting in part).

factors identified in 18 U.S.C. § 3553(a).[23] The *Booker* Court also modified the appellate standard of review for federal sentencing decisions. Before *Booker*, appellate courts generally reviewed sentencing determinations de novo.[24] *Booker* held, however, that sentencing decisions would be reviewed for "reasonableness."[25] Reasonableness is an unusual standard of appellate review,[26] and since *Booker* was decided in 2005, the Court has heard three additional cases to clarify how appellate courts ought to review district court sentencing decisions.

The first of these post-*Booker* cases, *Rita v. United States*, authorized courts of appeals to review within-Guidelines sentences using a "presumption of reasonableness."[27] The second case, *Gall v. United States*, rejected a rule adopted by several courts of appeals that had required district courts to give "'proportional' justifications for departures from the Guidelines range."[28] The *Gall* Court clarified that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."[29]

The third case in which the Court clarified the appropriate scope of appellate review was *Kimbrough v. United States*.[30] The issue in *Kimbrough* was whether a district court may impose a sentence outside the Guidelines range based solely on a policy disagreement with the Sentencing Commission's treatment of crack cocaine. Federal criminal law's treatment of crack cocaine has long been controversial,[31] as a defendant convicted for a crack cocaine offense is, for sentencing purposes, treated the same as an offender convicted for an offense involving 100 times more powder cocaine.[32]

---

23. *Id*. at 245–46.

24. *See* 18 U.S.C. § 3742(e) (2006).

25. *Booker*, 543 U.S. at 261 (directing appellate courts to "determine whether the sentence 'is unreasonable' with regard to § 3553(a)").

26. *See* Hessick & Hessick, *supra* note 6, at 9–11, 14–16.

27. 551 U.S. 338, 341 (2007).

28. 552 U.S. 38, 46 (2007) (citation omitted).

29. *Id*. at 51.

30. Kimbrough v. United States, 552 U.S. 85 (2007).

31. *See, e.g.*, Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT. REP. 87, 91 (2003) (advocating a reassessment of the "distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine"); William Jefferson Clinton, Op-Ed., *Erasing America's Color Lines*, N.Y. TIMES, Jan. 14, 2001, at WK17 (arguing for reducing the sentencing disparity between crack and powder cocaine); Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 155–56 (2003) (collecting "street culture" criticisms of the crack/powder cocaine sentencing disparity); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1298–1301 (1995) (arguing that the crack/powder cocaine disparity should raise equal protection concerns); *see generally* DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007).

32. *See infra* note 36 and accompanying text.

Several circuits had held that district courts were bound to apply the crack Guideline, which incorporated this 100-to-1 ratio, unless there were case-specific circumstances warranting a non-Guidelines sentence.[33] The *Kimbrough* Court held that district courts have the ability to sentence outside of the Guidelines range based on a categorical disagreement with the crack/powder cocaine disparity, suggesting that district courts are free to base sentencing decisions on policy disagreements with the Guidelines as opposed to case-specific factual circumstances.[34]

The government's brief in *Kimbrough* conceded "that the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'"[35] However, the government argued that the crack/powder cocaine disparity was "an exception to the 'general freedom that sentencing courts have' . . . because the ratio is 'a specific policy determinatio[n] that Congress has directed sentencing courts to observe.'"[36] The 100-to-1 sentencing ratio for crack versus powder cocaine derives from Congress's 1986 Anti-Drug Abuse Act, which set different mandatory minimum sentences for crack cocaine than powder cocaine.[37] The *Kimbrough* Court ultimately rejected the government's argument that the crack/powder cocaine disparity was mandated by congressional policy, stating, inter alia, that Congress "mandate[d] only maximum and minimum sentences . . . . The statute says nothing about the appropriate sentences within these brackets, and we decline to read any implicit directive into that congressional silence."[38]

Although the *Kimbrough* Court held that district courts are free to

33. *See* United States v. Leatch, 482 F.3d 790, 791 (5th Cir. 2007) (per curiam); United States v. Johnson, 474 F.3d 515, 522 (8th Cir. 2007); United States v. Pho, 433 F.3d 53, 62–63 (1st Cir. 2006); United States v. Castillo, 460 F.3d 337, 361 (2d Cir. 2006); United States v. Eura, 440 F.3d 625, 633–34 (4th Cir. 2006); United States v. Miller, 450 F.3d 270, 275–76 (7th Cir. 2006); United States v. Williams, 456 F.3d 1353, 1369 (11th Cir. 2006). *But see* United States v. Pickett, 475 F.3d 1347, 1355–56 (D.C. Cir. 2007) (holding that the district court erred when it concluded that it had no discretion to consider the crack/powder cocaine disparity in imposing a sentence); United States v. Gunter, 462 F.3d 237, 248–49 (3d Cir. 2006) (same).

34. *See Kimbrough*, 552 U.S. at 101–02; *see also* Spears v. United States, 129 S. Ct. 840, 844 (2009) (confirming that district courts may reject and categorically vary from the crack/powder cocaine Guidelines even in a "mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range") (citation omitted).

35. *Kimbrough*, 552 U.S. at 101 (quoting Brief for the United States at 16, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2461473 (alteration in original)).

36. *Id*. (quoting Brief for the United States at 16, 25, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2461473).

37. Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (1986). It imposed a five-year mandatory minimum on any defendant accountable for five grams of crack or 500 grams of powder, 21 U.S.C. § 841(h)(1)(B)(ii), (iii) (2006), and a ten-year mandatory minimum on any defendant accountable for fifty grams of crack or 5,000 grams of powder, § 841(h)(1)(A)(ii), (iii).

38. *Kimbrough*, 552 U.S. at 102–03.

sentence outside the Guidelines based on a policy disagreement with the crack cocaine Guideline, the opinion did not appear to adopt the government's broad concession "that as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'"[39] Instead, the Court appeared to place some limits on the ability of district courts to sentence based on policy disagreements to cases involving particular Guidelines. The Court intimated that district courts are not constrained by the crack/powder cocaine sentencing ratio because the crack cocaine "Guidelines do not exemplify the Commission's exercise of its characteristic institutional role."[40] The Court noted in "formulating Guidelines ranges for crack cocaine offenses, . . . the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.'"[41] The Court indicated that, "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'"[42] And, in such an ordinary case—that is, in a case where the Guidelines in question *do* "exemplify the Commission's exercise of its characteristic institutional role"[43]—"closer review may be in order" when a district court bases its decision to impose a non-Guidelines sentence on a policy disagreement.[44] The Court reiterated this possibility of "closer review" in a subsequent case, *Spears v. United States*, stating that a district court's "'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect."[45]

III. CRITICISMS OF THE *KIMBROUGH* OPINION

The Court's opinion in *Kimbrough* can be criticized on a number of grounds: It contradicts a number of nonsentencing legal doctrines, and it has led to confusion and conflict in the circuits, some of which is directly attributable to the Court's reliance on a largely inaccurate picture of the Guidelines as derived from empirical study. The *Kimbrough* opinion departs from ordinary legal principles in two distinct ways. First, as I have argued elsewhere, the decision in *Kimbrough* turns ordinary appellate practice on its

39. *Id*. at 101 (quoting Brief for the United States at 16, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2461473).

40. *Id*. at 109.

41. *Id*. at 109–10 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

42. *Id*. at 109 (quoting Rita v. United States, 551 U.S. 338, 350 (2007)).

43. *Id*.

44. *Id*.

45. Spears v. United States, 129 S. Ct. 840, 843 (2009) (per curiam).

head by requiring appellate courts to defer to district courts' policy decisions.[46] "Policy decisions"—as the term is used in *Kimbrough*—are legal determinations, and are thus ordinarily subject to de novo review.[47] But "de novo appellate review of substantive sentencing policy determinations would functionally reinstate the mandatory system condemned in *Booker* because it would inevitably result in binding legal rules defining sentencing ranges."[48] Deferential review largely avoids this problem,[49] but it does so by sacrificing uniformity.

Second, the Court's analysis regarding which Guidelines are deserving of "closer" appellate review also runs counter to ordinary principles of administrative law, as it seems to suggest that district courts have a greater obligation to defer to the policy determinations of the U.S. Sentencing Commission than to the policy determinations of Congress.[50] The crack/powder cocaine Guidelines were, according to the *Kimbrough* Court, acceptably disregarded by district courts because

> The Commission did not use [its ordinary] empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme. The Guidelines use a drug quantity table based on drug type and weight to set base offense levels for drug trafficking offenses. In setting offense levels for crack and powder cocaine, the Commission, in line with the 1986 Act, adopted the 100-to-1 ratio.[51]

---

46. *See generally* Hessick & Hessick, *supra* note 6.

47. *Id*. at 26–27.

48. *Id*. at 30; *see also id*. at 30 n.149.

49. *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (stating that a judicial holding that one interpretation is reasonable does not bar an agency from adopting a different, reasonable interpretation).

50. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1491–92 (2008).

> Most curiously, the opinion suggests that implementing the will of Congress is the exception for the Commission, and that where the Commission is merely responding to the requests or mandates of Congress, sentencing judges have freedom to disagree with the policy judgments embedded in the Guidelines. Where, on the other hand, the Guidelines represent "empirical analysis," judges are generally not free to disagree with the policy judgments they embody . . . . Of course, reflecting the will of Congress is ordinarily a basis for *judicial deference* to administrative regulations.

Id.

51. Kimbrough v. United States, 552 U.S. 85, 96–97 (2007) (citation omitted).

The *Kimbrough* Court also noted that, based on "additional research and experience with the 100-to-1 ratio," the Commission later concluded that the crack/powder cocaine sentencing disparity "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act."[52] The Commission has, on more than one occasion, communicated its new conclusions about the crack/powder cocaine sentencing disparity to Congress and suggested that Congress ought to revisit the 100-to-1 ratio reflected in statutory minimum sentences.[53] Congress has, to date, not acted on those findings or the Commission's suggestion.

The *Kimbrough* Court's decision to permit district courts to deviate from Guidelines that the Commission itself now disavows makes some sense. After all, the Commission is an expert agency, and thus its conclusions regarding crack and powder cocaine should carry some weight.[54] However, the Commission is not the only governmental body that has expressed an opinion of the appropriate sentencing policy. Congress's determination that a 100-to-1 ratio is appropriate is reflected in its 1986 drug legislation, and that determination formed the basis for the original crack cocaine sentencing Guidelines. But the Court essentially accorded this congressional policy decision no weight. In saying that district courts are free to disagree with the crack/powder cocaine disparities in the Guidelines because they are the product of a Commission effort to effectuate a congressional policy choice, as opposed to the Commission's ordinary empirical process, *Kimbrough* is inconsistent with administrative law principles. The principle underlying one of the stronger forms of judicial deference to administrative action—*Chevron* deference—is based, in part, on the idea that the agency is acting in accord with Congress's wishes.[55]

Aside from disregarding ordinary legal principles, *Kimbrough* has led to

---

52. *Id*. at 97 (quoting U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf [hereinafter COCAINE AND FEDERAL SENTENCING POLICY].

53. *See, e.g.*, COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 52, at 93; U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), *reprinted in* 10 FED. SENT'G REP. 184 (1998).

54. *Cf.* United States v. Anderson, 82 F.3d 436, 450 & n.8 (D.C. Cir. 1996) (Wald, J., dissenting) (discussing district court authority to depart from the crack Guideline after the Commission issued a report critical of the crack/powder cocaine disparity; noting that "surely the Commission as a data collection body must have significant expertise concerning the impact of its own guidelines" and that "if this were a run-of-the-mill administrative law case, I predict that we would not hesitate for a moment to vacate an agency's legislative rule, if the agency itself admitted that the rule was arbitrary, capricious, unfair, and violative of a federal statute, and then documented that admission with credible evidence").

55. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* Stith, *supra* note 50, at 1492 ("[R]eflecting the will of Congress is ordinarily a basis for *judicial deference* to administrative regulations.").

confusion and conflict in the circuits. One specific feature of *Kimbrough* that is causing circuit confusion and conflict is the Court's analysis regarding which Guidelines are deserving of "closer" appellate review. The Court's dictum on this issue is based on the premise that most Guidelines are the product of Commission expertise. *Kimbrough* notes that "Congress established the Commission to formulate and constantly refine national sentencing standards [and that] the Commission fills an important institutional role [because it] has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."[56]

But this description of the Sentencing Commission's institutional strengths and the process by which the Guidelines were written is not entirely accurate. For one thing, the empirical process that the Court repeatedly praises[57] is methodologically suspect. For another, a great number of Guidelines were not based on the empirical process. *Kimbrough*'s failure to accurately describe how the Guidelines were developed and amended may lead to circuit court confusion and conflict because identifying which Guideline deviations are subject to closer review will require litigants and courts to dissect the origin and amendments of each Guideline. *Kimbrough* suggests that courts must attempt to determine whether the present Guideline is sufficiently derived from "'empirical data and national experience.'"[58] If a court believes that a Guideline is based on suspect methodology or has either promulgated or subsequently amended a Guideline in a fashion that deviates from "empirical data and national experience"—whatever that might mean—then it must decide whether that Guideline is entitled to closer review.[59] And that is a question likely to be answered differently by different judges.[60]

Prior to his appointment to the Supreme Court, Justice Breyer served as one of the original U.S. Sentencing Commissioners and is often referred to as the principal author of the original Guidelines.[61] Soon after the Guidelines were originally promulgated, then-Judge Breyer published a law review article in which he described the process by which the Guidelines were created:

---

56. *Kimbrough*, 552 U.S. at 108–09 (internal citations and quotation marks omitted).

57. *Kimbrough*, like the opinion in *Booker* and its other progeny, contains laudatory language about the Sentencing Commission. *Id*. at 109–10; *see* Rita v. United States, 551 U.S. 338, 348–49 (2007); Gall v. United States, 552 U.S. 38, 46 (2007); United States v. Booker, 543 U.S. 220, 252–56, 264–65 (2005).

58. *Kimbrough*, 552 U.S. at 109 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

59. *See id.*

60. *Cf. Leading Cases*, *supra* note 4, at 331 (noting that "*Kimbrough* left judges with little guidance on how to incorporate or review policy disagreements and related factors").

61. *See* STITH & CABRANES, *supra* note 14, at 58.

> Faced, on the one hand, with those who advocated "just deserts" but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated "deterrence" but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.[62]

The Commission had access to the sentences imposed for tens of thousands of cases, and it used the average sentences imposed as a "numerical anchor for guideline development."[63] But while the Commission's process could accurately capture the length of sentences that judges imposed, it was poorly designed to identify the sentencing factors that influenced past sentencing practice.[64] As Kate Stith has noted, "there were no available data in most presentence reports with respect to many of the factors that the Sentencing Commission decided were most relevant to a sentence; nor did the Commission seek to determine what factors the sentencing judges in the sample of 10,000 cases actually considered in imposing sentence."[65] That this empirical process did not accurately determine the "past practice" of judges

---

62. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988).

63. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 22 (1987) [hereinafter SUPPLEMENTARY REPORT]; *see also* Breyer, *supra* note 62, at 17 ("The numbers used and the punishments imposed would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals."); Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 125 (2003) ("The [C]ommission used the average sentences (conditioned on the percentage of persons actually sentenced to prison) as the basis for their final deliberations.").

64. The Commission used data from past cases to try to isolate variables that played a role in increasing or decreasing an offender's sentence, but as then-Judge Breyer noted, the Commission faced "uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors . . . ." Breyer, *supra* note 62, at 19. To the extent the Commission tried to use past sentencing practice to identify sentencing factors, then-Judge Breyer described the following process: "The Commission was able to determine which past factors were important in pre-Guideline sentencing by asking probation officers to analyze 10,500 actual past cases in detail . . . ." *Id*. at 18. But it was *judges* not probation officers who ultimately decided what sentence to impose and what sentencing factors to consider in selecting that sentence prior to the Guidelines. *Id*.

65. Stith, *supra* note 50, at 1491; *see also* Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 578 (2009) (citing STITH & CABRANES, *supra* note 14, at 61) (noting that "when the Commission drafted the original Guidelines it had limited data concerning past practice, and the data it did have was sketchy").

regarding which facts were relevant in sentencing almost certainly is reflected in the Guidelines: The Guidelines contained far more aggravating than mitigating factors,[66] and they largely failed to account for an offender's background, other than her criminal history, which seems inconsistent with pre-Guideline sentencing practice.[67]

The process that the Commission used to determine past practice has been the subject of repeated methodological criticism. Bernard Harcourt, for example, has noted that the Commission "did not create a statistical model to replicate judicial decision making, but instead used a basic averaging approach to estimate existing sentencing practices along certain variables."[68] Harcourt has also stated that the Commission's "actual methodology is somewhat mysterious; the methodological appendix to the sentencing guidelines does not meet social science standards and seems almost deliberately intended to obfuscate discussion of the methods used."[69] Kate Stith and José Cabranes have noted that "the Commission diminished the advantages of relying on past sentencing practices by *failing to do so in any systematic way*."[70] They also note that "the Commission's data analysis was limited, and possibly compromised, in several fundamental respects. The Commission conceded that for several categories of offenses it simply did not have sufficient data to ascertain average past practice."[71] And because "the Commission arbitrarily excluded sentences of probation, [it] significantly skewed the data relating to past practice because approximately 50% of defendants in the preguideline era received sentences of probation."[72]

Whatever the merit of the Commission's empirical process, it is indisputable that the Commission elected to deviate from past practice in a

66. Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1128 (2008); Michele A. Kalstein et al., *Calculating Injustice: The Fixation on Punishment As Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 605 (1992).

67. *See, e.g.*, United States v. Daniels 446 F.2d 967, 971 (6th Cir. 1971) (suggesting that sentencing courts have a duty to consider "all of the circumstances surrounding the commission of the crime and the past life and habits of the [defendant]"); *see also* STITH & CABRANES, *supra* note 14, at 79–80 (commenting that, prior to the enactment of the Guidelines, "the largest section of the presentence report"—which was an important document for a judge's sentencing deliberations—"dealt with the personal history and circumstances of the defendant"); Kalstein et al., *supra* note 66, at 604 ("In direct contrast to sentencing practices [prior to the SRA], the Guidelines effectively forbid the court to consider the personal characteristics of the defendant (except for criminal history) and focus instead on the offense and the defendant's role in the offense.").

68. Harcourt, *supra* note 63, at 123.

69. *Id.* Harcourt also identifies a "number of inconsistencies" in the report the Commission issued explaining the initial Guidelines. *Id.* at 123 n.122 (discussing SUPPLEMENTARY REPORT, *supra* note 63).

70. STITH & CABRANES, *supra* note 14, at 60.

71. *Id.* at 61.

72. Adelman & Deitrich, *supra* note 65, at 578.

significant number of areas.[73] As a general matter, the Commission elected to limit the number of factual distinctions between offenders (i.e., the number of sentencing factors). Reasoning that "the more facts the court must find . . . , the more unwieldy the [sentencing] process becomes,"[74] the Commission self-consciously forbade courts from considering factors that previously played a role in sentencing decisions. Individual characteristics of a defendant—factors that traditionally played a largely mitigating role—"were determined to be either not relevant or not ordinarily relevant" to sentencing decisions.[75] The Commission not only deviated from past practice with respect to sentencing factors, but also with respect to sentence lengths. In formulating the initial Guidelines, "the Commission provided for significant increases in sentences for major categories of crime . . . ."[76] Indeed, as other commentators have noted, the "categories of offenses, for which the Commission conceded it purposely deviated from past practice . . . actually far outnumber the remaining categories of cases."[77]

Since they were originally promulgated, the Guidelines have drifted further away from their original empirical basis. There have been "hundreds of amendments to the original Guidelines, most of which increase penalties at the express direction of Congress."[78] The Supreme Court did not appear to take note of this trend in its recent sentencing opinions. Discussing Justice Breyer's description of the Guidelines in *Rita*, Paul Hofer has said: "Absent from his description of the Commission's work is any discussion of the role played by mandatory minimum penalty statutes, specific directives from Congress to the Sentencing Commission to increase penalties or set them at particular levels, or the many other ways that Congress has shaped the present Guidelines."[79]

The *Kimbrough* Court's simplistic description of the Guidelines' promulgation being an "empirical process"[80] and their subsequent

---

73. *E.g.*, United States v. Jones, 531 F.3d 163, 173 n.7 (2d Cir. 2008) (collecting sources indicating that the Guidelines did not, in fact, accurately represent past sentencing practice).

74. Breyer, *supra* note 62, at 11.

75. Harcourt, *supra* note 63, at 126.

76. Stith, *supra* note 50, at 1491; *see also* Adelman & Deitrich, *supra* note 65, at 578 (noting that "the Commission, without serious explanation, increased the severity of sentences for a number of offenses").

77. STITH & CABRANES, *supra* note 14, at 60–61.

78. Stith, *supra* note 50, at 1491; *see also* Adelman & Deitrich, *supra* note 65, at 578 (noting that "since enacting the original Guidelines, the Commission has amended many of them, making them even more severe").

79. Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 DENV. U. L. REV. 27, 47 (2007).

80. The Court's decision in *Gall*, decided the same day as *Kimbrough*, included the following remark:

amendments being based on "national experience" is misleading.[81] This inaccuracy is problematic because the Court has suggested that the level of appellate scrutiny for non-Guidelines sentences that are based on policy disagreement may turn on whether a particular Guideline was derived from "empirical data and national experience."[82] In determining whether Guideline deviations are subject to closer review, courts of appeals attempt to identify the origin and amendments of each Guideline and determine whether the present Guideline is sufficiently derived from empirical data and national experience.[83] But because the *Kimbrough* Court did not acknowledge "the many other ways that Congress has shaped the present Guidelines,"[84] courts have reached different conclusions about the same Guidelines. For example, the Eleventh Circuit undertook an analysis of the child pornography Guideline § 2G2.2, concluding that this Guideline

> [does] not exhibit the deficiencies the Supreme Court identified in *Kimbrough*. First, the Guidelines range is derived at least in part from the early Parole Guidelines, rather than directly derived from Congressional mandate. . . . Second, there is no indication that either the Guidelines range or the policy statement . . . suffers from any criticisms like those *Kimbrough* identified for the crack cocaine Guidelines. There, the Supreme Court found that the Sentencing Commission itself had "reported that the crack/powder disparity produces disproportionately harsh

---

> Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes. This decision, and its effect on a district judge's authority to deviate from the Guidelines range in a particular drug case, is addressed in *Kimbrough v. United States*.

Gall v. United States, 552 U.S. 38, 46–47 n.2 (2007) (citing U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2006); *Kimbrough*, 552 U.S. 85 (2007)).

81. As Judge Lynn Adelman and Jon Deitrich have recently explained, "few guidelines can be shown to be based on actual preguideline sentencing practice or on Commission research and expertise," and many of the subsequent Guideline amendments "came in response to Congress's actions—either its establishment of mandatory minimums or its directives to the Commission." Adelman & Deitrich, *supra* note 65, at 578–79.

82. *Kimbrough*, 552 U.S. at 109 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

83. This may be difficult because "[t]he only account of the Commission's so-called past-practice study, the *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, is unlikely to contain evidence that a particular guideline reflects past practice." Adelman & Deitrich, *supra* note 65, at 580.

84. Hofer, *supra* note 79, at 47.

> sanctions." Here, the Sentencing Commission has not made any similar statements; rather, the Guidelines and policy statement are based in part upon Congress's longstanding concern for recidivism in such cases . . . .[85]

Notably, several courts disagree with this closer review analysis of the child pornography Guideline.[86] The Seventh Circuit has stated that

> the child-pornography sentencing guidelines, like the drug guidelines at issue in *Kimbrough v. United States*, are atypical in that they were not based on the Sentencing Commission's nationwide empirical study of criminal sentencing. . . . "[M]uch like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses."[87]

A number of district courts have concluded "that the child-pornography guidelines' lack of empirical support provides sentencing judges the discretion to sentence below those guidelines based on policy disagreements with them."[88]

The child pornography Guideline is far from the only Guideline whose present ranges are not solely a reflection of "past practice or any of the laudatory guideline amendment processes envisioned in the Sentencing Reform Act, but instead the will of Congress expressed through the medium of the sentencing Guidelines."[89] Thus, it is quite possible that the circuits will continue to disagree about which Guidelines are entitled to closer review in the event of district court policy disagreement. Indeed, the circuits

---

85. United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (citations omitted).

86. Assistant Federal Public Defender Troy Stabenow has written a paper detailing how these guidelines, like the crack/powder cocaine guidelines, were based largely on congressional directives rather than empirical study. Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (July 3, 2008) (unpublished paper), *available at* http://mow.fd.org/3%20July%202008%20Edit.pdf.

87. United States v. Huffstatler, 561 F.3d 694, 696–97 (7th Cir. 2009) (citations omitted) (quoting U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM x (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf).

88. *Id*. at 697 (collecting cases).

89. Hofer, *supra* note 79, at 47–48; *see also* Adelman & Deitrich, *supra* note 65, at 579 ("Many of the Commission's amendments increasing the severity of sentences came in response to Congress's actions—either its establishment of mandatory minimums or its directives to the Commission. Such amendments obviously are not based on Commission research and expertise.") (footnote omitted).

themselves have commented about the lingering state of appellate uncertainty after *Kimbrough*.[90] Perhaps in an attempt to avoid this uncertainty, several courts have recast what appear to be district courts' policy disagreements with the Guidelines as case-specific reasons for imposing a non-Guidelines sentence.[91] Such a recasting permits courts to review district court decisions under the more simple abuse-of-discretion standard articulated in *Gall*,[92] rather than forcing appellate courts to grapple with the closer review language in *Kimbrough*. Indeed, one opinion noted that, because "the District Court did not vary from the Guidelines range 'solely' based on a disagreement with its ability to properly reflect § 3553(a) considerations," the court did not need to "elaborate further on what the 'closer review' and 'less respect' mentioned in *Kimbrough* . . . might entail."[93] Another court was even more direct, stating:

> Given our conclusion that the sentence imposed by the district court is not based on a simple disagreement with the policies underlying [the Guideline], as opposed to something about [the defendant's] personal characteristics or history, this court need not delve into a difficult antecedent question: how this court should review district court sentences based simply on a policy disagreement with the Guidelines.[94]

Until the Court adopts a more realistic view of the Guidelines' promulgation and amendments—and until it explains how its *Kimbrough* dictum about closer review ought to function under this more realistic view—

---

90. *See, e.g.*, United States v. Barron, 557 F.3d 866, 871 (8th Cir. 2009) ("The Court has been equivocal about whether a sentencing court owes greater deference to guidelines that do exemplify this 'characteristic institutional role,' and whether closer appellate review is warranted with respect to variances from such guidelines."); United States v. Mikowski, No. 08-1791, 2009 WL 1546375, at *5 n.9 (6th Cir. June 3, 2009) (quoting United States v. Grossman, 515 F.3d 592, 597 (6th Cir. 2008)) (noting that "[t]he extent to which a district court may offer a wholesale disagreement with a guideline as the basis for a variance remains unclear after *Kimbrough*"); United States v. Evans, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring) ("While I have closely studied the post-*Booker* Supreme Court triumvirate of *Rita*, *Kimbrough v. United States*, and *Gall*, I must conclude that the Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear. Inevitably, as is the nature of appellate courts, vacuums of legal uncertainty left by the Supreme Court are quickly filled in a circuit by circuit manner, sometimes resulting in a grab bag of possible solutions.") (citation omitted); *see also* United States v. Gil-Hernandez, 309 F. App'x 566, 567 (3d Cir. 2009) (characterizing whether *Kimbrough* has an impact on fast-track sentencing disparities as a "complicated" question).

91. *See, e.g.*, United States v. Garcia, 284 F. App'x 719, 721–22 (11th Cir. 2008); United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008); *see also* United States v. Simmons, 568 F.3d 564, 569–70 (5th Cir. 2009) (noting that a non-Guidelines sentence imposed because of "the special conditions of a particular offender" is not subject to "closer review" and then concluding that the district court's sentence was "based on the particular circumstances of this defendant").

92. *See supra* note 29 and accompanying text.

93. United States v. Tomko, 562 F.3d 558, 570, 571 & n.9 (3d Cir. 2009) (en banc).

94. United States v. Friedman, 554 F.3d 1301, 1311 n.13 (10th Cir. 2009).

confusion and disagreements are likely to persist.

IV. WHAT APPELLATE COURTS HAVE DONE AFTER *KIMBROUGH*

In light of the ambiguous language contained in the *Kimbrough* decision and the criticism that can be leveled at the opinion, it may come as no surprise that the circuits have taken several different approaches to reviewing district court policy determinations after *Kimbrough*. Indeed, the Court has already decided an additional case in order to clarify some ambiguous dicta from *Kimbrough* that led several circuits to permit district courts to vary from the crack cocaine Guidelines based only on individual case or defendant characteristics, rather than based on categorical policy disagreements.[95] *Spears v. United States* confirmed that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines," as opposed to case-specific criteria.[96] But several other points of contention remain, including whether to follow the closer review dictum, what effect *Kimbrough* had on prior circuit precedent, and whether certain Guidelines represent policy choices by the Commission or by Congress. The circuits disagree on each of these questions.

The circuits have taken divergent approaches on the question of whether district court policy disagreement with certain Guidelines—those that were the product of empirical data and national experience[97]—ought to be subject to closer review.[98] The Second Circuit, skeptical of these dicta in *Kimbrough*, noted that it does not "take the Supreme Court's comments concerning the scope and nature of 'closer review' to be the last word on these questions"[99] and that the reference to closer review

> cannot be construed as a signal to view non-Guidelines sentences with inherent suspicion or to establish a higher standard of review than abuse of discretion for some non-Guidelines sentences. While an appellate court may certainly consider the extent of a Guidelines variance as well as any policy concerns informing it in reviewing the totality of circumstances bearing on the reasonableness of a

95. The following language from *Kimbrough* appears to have misled post-*Kimbrough* courts: "[T]he [district] court did not purport to establish a ratio of its own. Rather, it appropriately framed its final determination in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." Kimbrough v. United States, 552 U.S. 85, 111 (2007).

96. Spears v. United States, 129 S. Ct. 840, 843–44 (2009).

97. *Kimbrough*, 552 U.S. at 109.

98. *Id.*

99. United States v. Cavera, 550 F.3d 180, 192 (2d Cir. 2008).

> challenged sentence, what it may *not* do is review the district court's fact finding for anything other than clear error.[100]

The Fourth Circuit has similarly noted that, although the *Kimbrough* opinion indicates that "closer review may be in order," if a district court disagrees with Guidelines policy in a "'mine-run case,'. . . regardless of whether the district court has agreed or disagreed with the Commission, we may only review the reasonableness of the sentence imposed."[101] And the Fifth Circuit has, at least in one opinion, read *Kimbrough* expansively, stating that a district court may disagree with all Guidelines policy decisions because "*Kimbrough* does not limit the relevance of a district court's policy disagreement with the Guidelines to the situations such as the cocaine disparity and whatever might be considered similar."[102]

Not all circuits have been so dismissive of the *Kimbrough* dicta. Others have analyzed the process by which a Guideline was developed when reviewing district court policy decisions. For example, the First Circuit engaged in a detailed analysis to determine whether the fast-track departure Guideline is similar to the crack/powder cocaine disparity. The court reasoned that, like the crack/powder cocaine disparity, "fast-track departure authority has been both blessed by Congress and openly criticized by the Sentencing Commission" and that "the fast-track departure scheme does not 'exemplify the [Sentencing] Commission's exercise of its characteristic institutional role.'"[103] These similarities led the First Circuit to conclude that a non-Guidelines sentence "premised on perceived inequities attributable to the availability elsewhere of fast-track departures would, given the Supreme Court's new gloss, seem to be entitled to deference 'even in a mine-run case.'"[104] And, as discussed in more detail above, several courts have analyzed whether the child pornography Guideline is the product of empirical

---

100. United States v. Jones, 531 F.3d 163, 173 (2d Cir. 2008). The Second Circuit has even pointed (in dicta) to other Guidelines, which if the subject of district court policy disagreement, "should be reviewed especially deferentially." *Cavera*, 550 F.3d at 192. The *Cavera* Court specifically identified those "Guidelines enhancements and reductions [which] apply without modulation to a wide range of conduct," including the Armed Career Criminal Guidelines and those financial Guidelines that "drastically vary as to the recommended sentence based simply on the amount of money involved." *Id*. This suggests an entirely different standard for deferential appellate review than whether a Guideline was the product of empirical data and national experience.

101. United States v. Evans, 526 F.3d 155, 165 n.4 (4th Cir. 2008) (quoting *Kimbrough*, 552 U.S. at 109; Gall v. United States, 552 U.S. 38, 50 (2007)).

102. United States v. Simmons, 568 F.3d 564, 569 (5th Cir. 2009) (quoting *Kimbrough*, 552 U.S. at 101). The court went on to note the closer review language and observe that this language "might require further case development." *Id*.

103. United States v. Rodriguez, 527 F.3d 221, 227 (1st Cir. 2008) (quoting *Kimbrough*, 552 U.S. at 109) (alterations in original).

104. *Id*. (quoting *Kimbrough*, 552 U.S. at 109–10).

data and national experience.[105]

In the wake of *Kimbrough*, circuit court judges have disagreed whether *Kimbrough*'s recognition that district courts may sentence outside the Guidelines based on a policy disagreement extends beyond the crack/powder cocaine disparity to other Guidelines.[106] The district court policy disagreements discussed include the career offender Guideline,[107] the fast-track Guideline,[108] the terrorism Guideline,[109] the child pornography and exploitation Guidelines,[110] local community characteristics,[111] and acquitted conduct.[112]

---

105. *See supra* notes 85–88 and accompanying text.

106. *Compare* United States v. Vandewege, 561 F.3d 608, 610–11 (6th Cir. 2009) (Gibbons, J., concurring in the judgment) ("Neither *Kimbrough* nor *Spears* authorized district courts to categorically reject the policy judgments of the Sentencing Commission in areas outside of crack-cocaine offenses, as the majority suggests. *Kimbrough* instead expressly reserved the question as to whether a district court could categorically vary from the Guideline range based solely upon a policy disagreement with the Commission in an area other than the crack-cocaine disparity . . . . The Supreme Court only hinted that *if* a district court *could* categorically depart from the Guidelines range in an area where the Commission has exercised its 'characteristic institutional role,' closer scrutiny of such a variance *may* be required. *Kimbrough* has thus not 'made it clear' that district courts may vary from the Guidelines based solely upon any policy disagreement.") (citations omitted), *with* United States v. Lente, 323 F. App'x 698, 712–13 (10th Cir. 2009) (Holmes, J., concurring in the judgment) ("Although *Kimbrough* arose in the crack-powder cocaine context, we have not questioned that its holding concerning policy disagreements extends beyond that context."). And some courts have noted the question, but not decided the issue. *E.g.*, United States v. Johnson, 553 F.3d 990, 996 (6th Cir. 2009) ("[W]e express no opinion on whether the principles articulated in [*Kimbrough* and] *Spears* may apply outside of the crack-cocaine context to allow district courts to develop categorical alternatives to other sentencing enhancements contained in the Guidelines that 'do not exemplify the Commission's exercise of its characteristic institutional role.'") (quoting Spears v. United States, 129 S. Ct. 840, 843 (2009)).

107. *E.g.*, United States v. Boardman, 528 F.3d 86, 86–87 (1st Cir. 2008) (indicating that policy disagreement was permitted).

108. *E.g.*, *Rodriguez*, 527 F.3d at 227 (permitting policy disagreement); United States v. Gonzalez-Zotelo, 556 F.3d 736, 741 (9th Cir. 2009) (prohibiting district court disagreement).

109. *E.g.*, United States v. Tankersley, 537 F.3d 1100, 1112–13 (9th Cir. 2008) (addressing only whether the district court disagreed with the Commission on congressional policy; not addressing the closer review issue).

110. *E.g.*, United States v. Huffstatler, 561 F.3d 694, 696–97 (7th Cir. 2009). As the *Huffstatler* Court noted, a number of district courts have concluded "that the child-pornography guidelines' lack of empirical support provides sentencing judges the discretion to sentence below those guidelines based on policy disagreements with them." *Id*. at 697 (citing cases). It appears that the government has appealed at least one of these decisions. United States v. Grober, 595 F. Supp. 2d 384, 412 (D.N.J. 2008) (sentencing defendant to sixty months imprisonment, well below the Guidelines range of 235 to 293 months), *appeal docketed*, No. 09-2120 (3d Cir. Jan. 28, 2009).

111. *E.g.*, United States v. Politano, 522 F.3d 69, 73–74 (1st Cir. 2008) (appears to have been decided on case-specific grounds, but recast in *Rodriguez*, 527 F.3d at 230, as permitting policy disagreement); United States v. Cavera, 550 F.3d 180, 201 (2d Cir. 2008).

112. *E.g.*, United States v. Ibanga, 271 F. App'x 298, 300–01 (4th Cir. 2008) (categorizing as "procedural error" a district court's categorical exclusion of acquitted conduct from its sentencing decision, despite the district court's stated reasoning "that sentencing based upon acquitted conduct

The differing treatment for the various policy disagreements appears to depend not only on whether the circuit employs the closer review contemplated in *Kimbrough*, but also two other issues. The first is how a circuit analyzes *Kimbrough*'s effect on previous circuit precedent. Some of the post-*Kimbrough* circuit splits appear to be attributable to how the circuits treat intervening Supreme Court cases that undermine the reasoning of prior opinions from their own circuit. Some circuits have concluded that the reasoning in *Kimbrough* abrogates prior circuit opinions that forbade district courts from disagreeing with particular Guidelines. The First Circuit, for example, has taken a relatively broad view of *Kimbrough*'s effect on its prior decisions, on the theory that, even if *Kimbrough* did not directly overrule prior precedent, it "offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind."[113] Other circuits, such as the Ninth[114] and the Eleventh,[115] have construed *Kimbrough*'s effect on prior opinions more narrowly.

---

would not promote respect for the law as it would thwart the historic roles of the jury as finder of fact, protector against government overreaching, and arbiter of guilt or innocence"); United States v. Settles, 530 F.3d 920, 924 (D.C. Cir. 2008) ("[E]ven though district judges are not *required* to discount acquitted conduct, the *Booker–Rita–Kimbrough–Gall* line of cases may *allow* district judges to discount acquitted conduct in particular cases—that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate.").

113. *Rodriguez*, 527 F.3d at 225. In one instance, the First Circuit elected to rehear en banc a case that questioned whether a non-residential burglary ought to be classified as a "crime of violence" under the Career Offender Sentencing Guideline. United States v. Giggey, 551 F.3d 27 (1st Cir. 2008). Noting that "there is no sign that the Sentencing Commission will resolve the ambiguity about its intentions in the Career Offender Guideline; an ambiguity has now existed for nearly twenty years," the en banc court elected to overrule its previous case. *Id.* at 29. Interestingly, after agreeing to hear the case en banc, but before overruling the previous panel decision, the First Circuit indicated that the district court was free to sentence below the Guidelines range based on a policy disagreement with the Guideline *as interpreted by the circuit's prior precedent*. *Id.*; *see* United States v. Boardman, 528 F.3d 86, 86–87 (1st Cir. 2008) ("[W]e do not see why disagreement with the Commission's policy judgment (as expressed in the guideline as we interpreted it in *Fiore*) would be any less permissible a reason to deviate than disagreement with the guideline policy judgment at issue in *Kimbrough*.").

114. *E.g.*, United States v. Gonzalez-Zotelo, 556 F.3d 736, 740 (9th Cir. 2009) ("*Kimbrough* did not 'effectively overrule[]' or 'undercut[] the reasoning' of *Marcial-Santiago* so that the two cases are 'clearly irreconcilable.'") (alterations in original).

115. *E.g.*, United States v. Vega-Castillo, 540 F.3d 1235 (11th Cir. 2008) (per curiam).

> Under the prior precedent rule, we are bound to follow a prior binding precedent "unless and until it is overruled by this court en banc or by the Supreme Court." . . . *Kimbrough* did not overrule *Castro* or its progeny, and so we are bound to apply the prior precedent rule in this appeal. Specifically, *Kimbrough* never discussed *Castro* or the cases following it, or otherwise commented on non-crack cocaine disparities, and so *Kimbrough* did not expressly overrule *Castro* or its progeny. . . . [T]he most that can be said of Vega-Castillo's argument is that it pits "reasoning against holding," but not "holding against holding."

Id. at 1236, 1238–39 (internal citations omitted).

These differing approaches to the effect of *Kimbrough* on circuit precedent are especially important in those circuits that essentially did not permit district court policy disagreements prior to *Kimbrough*. By refusing to revisit those decisions after *Kimbrough*, courts can essentially limit the effect of *Kimbrough* to the crack/powder cocaine Guidelines—or at least refuse to revisit any Guidelines litigated prior to *Kimbrough*.

The second issue resulting in circuit conflict over specific Guidelines is whether a particular Guideline represents a policy choice by Congress or by the Commission. This conflict has played out largely in the context of the career offender Guideline[116] and the fast-track Guideline.[117] The Fifth, Ninth, and Eleventh Circuits have concluded that the sentencing disparities resulting from fast-track departures were a result of congressional rather than Commission policy, and thus a district court may not reduce a defendant's sentence based on a policy disagreement with the fast-track disparities.[118] These courts have contended that fast-track disparities are congressional policy because

> Congress explicitly authorized downward sentencing departures for fast-track programs in the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act"). The PROTECT Act directed the Sentencing Commission to 'promulgate . . . a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized

116. *Compare* United States v. Liddell, 543 F.3d 877, 882–85 (7th Cir. 2008) (recognizing district court authority to disagree with the policy behind U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2006) and noting that "section 994(h) only addresses what the Sentencing Commission must do; it doesn't require *sentencing courts* to impose sentences 'at or near' the statutory maximums") *and* United States v. Sanchez, 517 F.3d 651, 663 (2d Cir. 2008) (similar), *with* United States v. Friedman, 554 F.3d 1301, 1311 n.13 (10th Cir. 2009) ("In contrast to the crack Guidelines, which were not adopted at the express direction of Congress, Congress did explicitly direct the Sentencing Commission to incorporate into the Guidelines, for career offenders convicted of violent crimes, sentencing ranges that are 'at or near the maximum term authorized.'") (quoting 28 U.S.C. § 994(h) (2006)) (internal citation omitted).

117. *Compare* United States v. Seval, 293 F. App'x 834 (2d Cir. 2008), *and Rodriguez*, 527 F.3d at 230 (finding that a variance was appropriate after *Kimbrough* "absent an unambiguous congressional directive barring sentencing courts from considering [the] disparity"), *with Vega-Castillo*, 540 F.3d at 1238–39, *and* United States v. Gomez-Herrera, 523 F.3d 554, 562–63 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 624 (2008) (holding that *Kimbrough* is not controlling on the issue of fast-track disparity because it "addressed only a district court's discretion to vary from the Guidelines based on disagreement with *Guideline*, not Congressional, policy"). *See generally* Alison Siegler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT'G REP. 299, 300 (2009) (noting the circuit split on this issue).

118. *See Gonzalez-Zotelo*, 556 F.3d at 737–41; *Vega-Castillo*, 540 F.3d at 1239; *Gomez-Herrera*, 523 F.3d at 563.

by the Attorney General and the United States Attorney.'[119]

In contrast, the First Circuit has concluded that fast-track disparity is not an "express congressional directive" and thus, under the reasoning of *Kimbrough*—which rejected the government's argument that district courts could not deviate from the crack Guideline "despite Congress's implicit acquiescence in, or even its endorsement of, the 100-to-1 crack/powder ratio"—a district court is permitted to disagree with the Guideline on policy grounds.[120] The Third Circuit has recently joined the First Circuit on this side of the split.[121]

Circuits have also taken differing approaches with respect to the career offender Guideline, with some insisting that the Guideline reflects congressional policy—that is, Congress "explicitly directed" the Commission's punishment of career offenders[122]—and others rejecting the view.[123] This split appears to have been fueled by dicta in *Kimbrough* suggesting that the career offender Guideline may be appropriately characterized as congressional policy.[124] Complicating the issue is that the government originally appears to have taken inconsistent positions on this question in different circuits[125] and, more recently, the United States has

119. *Gonzalez-Zotelo*, 556 F.3d at 739 (internal citations omitted).

120. *Rodriguez*, 527 F.3d at 229–30.

121. United States v. Arrelucea-Zamudio, No. 08-4397, 2009 WL 2914495 (3d Cir. Sept. 14, 2009).

122. *E.g.*, United States v. Vazquez, 558 F.3d 1224, 1228 (11th Cir. 2009), *vacated*, 130 S. Ct. 1135 (2010). The Seventh Circuit appears to have initially permitted district court disagreement with the career offender Guideline in *United States v. Liddell*, 543 F.3d 877, 882–85 (7th Cir. 2008), then prohibited it in *United States v. Welton*, No. 08-3799, 2009 WL 3151162, at *4 (7th Cir. Oct. 2, 2009) ("disavow[ing] that portion of" *Liddell* that "did not adequately recognize that the career offender crack/powder disparity is the result of a legislative act"), and finally permitted it again in *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) (en banc).

123. *E.g.*, United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008).

124. In rejecting the government's argument that the crack/powder disparity reflected a congressional policy, the *Kimbrough* Court noted that "[d]rawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." Kimbrough v. United States, 552 U.S. 85, 103 (2007) (citing 28 U.S.C. § 994(h)–(i) (2006)). The Court's distinction between the career offender Guideline and the crack/powder cocaine Guidelines might signal that the career offender Guideline is mandated by Congress and thus, like a statutory minimum sentence, may not be ignored by a sentencing court. On the other hand, the congressional directive was aimed at the Commission, rather than district courts, so there is some meaningful way to distinguish between this Guideline and statutory sentencing ranges.

125. *See Liddell*, 543 F.3d at 884 (noting that the First Circuit rejected the government's argument, "based on section 994(h), that the district court erred by awarding a below-guideline sentence to a crack career offender" and that the government submitted a brief before the Seventh Circuit "emphasiz[ing] that a district court can sentence below the career offender guidelines if the court disagrees with the policy underlying the crack/powder disparity").

confessed error in cases where appellate courts have stated that district courts have no authority to sentence outside the career offender Guideline based on a policy disagreement.[126]

One final post-*Kimbrough* circuit court development worth noting involves the presumption of reasonableness. A number of defendants have argued that their within-Guidelines sentences ought not to be reviewed on appeal under the presumption of reasonableness because the Guidelines used to calculate their sentences were not a product of empirical data and national experience. The opinion in *Rita* permitted appellate courts to employ a presumption of reasonableness, noting the presumption "simply recognizes the real-world circumstance that when the [sentencing] judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."[127] This holding in *Rita* was predicated on the Court's observation that the Commission's recommendation of a sentencing range will ordinarily "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."[128] But *Kimbrough* acknowledged that not all Guidelines necessarily reflect such an approximation. Indeed, the *Kimbrough* Court noted that "the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack cocaine offenses 'greater than necessary' in light of the purposes of sentencing set forth in § 3553(a)."[129] Seizing on this language from *Kimbrough*, several defendants note that if a Guideline does not reflect a rough approximation of the § 3553(a) sentencing goals—that is, if a Guideline "was not promulgated according to usual Sentencing Commission procedures and did not take into account 'empirical data and national experience'"[130]—then the analysis offered in support of the presumption in *Rita* is no longer applicable and the presumption of reasonableness ought not apply.

The two circuits that have addressed this argument have rejected it. The Fifth Circuit has repeatedly rejected this argument,[131] and the Tenth Circuit recently rejected it as well.[132] (It does not appear that the other circuits have

126. *See Corner*, 598 F.3d at 414 (noting that the "United States has confessed error and asked us to overrule *Welton*" and that before the "Supreme Court, the Solicitor General confessed error in *United States v. Vazquez*").

127. Rita v. United States, 551 U.S. 338, 351 (2007).

128. *Id*. at 350.

129. *Kimbrough*, 552 U.S. at 110.

130. *E.g.*, United States v. Davila-Romero, 297 F. App'x 386, 388 (5th Cir. 2008) (per curiam).

131. *E.g.*, United States v. Duarte, 569 F.3d 528, 530–31 (5th Cir. 2009); United States v. Saucedo-Martinez, 323 F. App'x 373, 374 (5th Cir. 2009); United States v. Hernandez-Funez, 307 F. App'x 799, 800 (5th Cir. 2009); United States v. Gonzales-Camacho, 301 F. App'x 314, 315–16 (5th Cir. 2008); *Davila-Romero*, 297 F. App'x at 387–88.

132. United States v. Tapia-Cortez, 327 F. App'x 793, 796 (10th Cir. 2009).

yet addressed the question.) The Fifth Circuit rejected this argument even when made by defendants sentenced under the crack cocaine Guideline that was specifically at issue in *Booker*.[133] According to the Fifth Circuit, *Kimbrough* did not address the presumption of reasonableness. It explained that "[a]lthough some language in *Kimbrough* could be read to support appellant's argument . . . the square holding of *Rita* in favor of our presumption sufficiently supports that presumption even in light of *Kimbrough*."[134] This reasoning seems suspect, and the court offered no analysis to support it. Instead, the Fifth Circuit's position seems based, at least in part, on a wish to avoid "wholesale, appellate-level reconception of the role of the Guidelines and review of the methodologies of the Sentencing Commission."[135] In suggesting that appellate review might be dependent upon whether the Commission incorporated empirical data and national experience when formulating individual Guidelines, the *Kimbrough* Court appears to invite "a piece-by-piece analysis of the empirical grounding behind each part of the sentencing guidelines"—an analysis that the Fifth Circuit seems eager to avoid.[136]

The Tenth Circuit's justification for continuing to impose the presumption of reasonableness for Guidelines that are without an empirical basis is more troubling. The court noted that *Kimbrough* did not address the presumption of reasonableness issue.[137] In addition, the court added that its "presumption of reasonableness is based on the purpose of promoting uniformity in sentencing."[138] This justification runs counter to the Supreme Court's opinion in *Rita*, which "appeared to deny that the presumption creates a legal bias for within-Guidelines sentences, stating that the presumption has no 'independent legal effect' but merely reflects the reality that a within-Guidelines sentence is likely to be reasonable."[139] Although uniformity in sentencing remains an important goal after *Booker*, as described below, uniformity may only be furthered through certain means. Because the *Booker* Sixth Amendment remedy was premised on the restoration of district court discretion, uniformity may not be achieved through restricting that discretion; otherwise federal

133. *See* United States v. Garrett, 318 F. App'x 294 (5th Cir. 2009).

134. *Davila-Romero*, 297 F. App'x at 388.

135. *Duarte*, 569 F.3d at 530.

136. *Id*.

137. *Tapia-Cortez*, 327 F. App'x at 796 ("*Kimbrough* does not bear on whether we should apply our presumption of reasonableness. *Kimbrough* addressed whether the *district court*, in exercising its discretion, was permitted to consider whether a Guideline has an empirical basis, and the Supreme Court held that it was.").

138. *Id*. (citing United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006)).

139. Hessick & Hessick, *supra* note 6, at 21.

sentencing risks running afoul of the Sixth Amendment doctrine identified in *Apprendi* and its progeny.

V. PROMOTING UNIFORMITY IN THE WAKE OF *KIMBROUGH*

Underlying the U.S. Supreme Court's post-*Booker* cases and the conflict in the circuits after *Kimbrough* is a fundamental tension between promoting adherence to the Guidelines without running afoul of the Sixth Amendment.[140] Indeed, the result in *Kimbrough*, including the vague and conflicting dicta regarding closer review, can be attributed to the precarious balance the Court is attempting to strike between district court sentencing discretion and the preservation of some adherence to the Guidelines through appellate review. Until this tension is resolved, circuit conflict is destined to persist, and repeated Supreme Court interventions may be necessary. One possible way to resolve this tension is to promote district court acceptance of the content of the Guidelines by encouraging the Commission to explain and (where appropriate) revisit its policy decisions that have shaped the Guidelines.

There are various ways to promote district court compliance with the Guidelines (and thus uniformity). One way is to simply require district courts to impose within-Guideline sentences. This was the approach taken by Congress in the SRA, and it is clearly incompatible with the *Booker* remedy to the Sixth Amendment sentencing problem. A second approach would be for district courts to defer to the Commission's judgments on how to best balance the competing interests identified in § 3553(a). But, as the Court recently held in *Nelson v. United States*,[141] this is not permissible, presumably because it also runs into the Sixth Amendment problem identified in *Booker*.

A third approach would be to ensure district court compliance through appellate review. This is the approach that the Court appears to have adopted.[142] Of course, close "appellate review of substantive sentencing policy determinations would functionally reinstate the mandatory system condemned in *Booker* because it would inevitably result in binding legal rules defining sentencing ranges."[143] To avoid this, the Court adopted a more

140

deferential form of appellate review: abuse of discretion.[144] But even this more deferential standard of review is not without Sixth Amendment problems. That is because, as I have explained elsewhere, appellate review is by its nature a limitation on district court discretion.[145] Thus, in selecting the restoration of district court discretion as the remedy in *Booker* for the Sixth Amendment sentencing problem, the Court has created a situation where limits on that discretion threaten to undermine the remedy and restore the system the Court previously held to be unconstitutional.

Moreover, the Court appears unwilling to fully embrace a deferential form of review. Presumably in an effort to promote adherence to the Guidelines, the Court has included dicta in recent opinions that appear to endorse a more stringent level of appellate review for non-Guidelines sentences. *Kimbrough* provides one example.[146] Although the outcome in *Kimbrough* appeared to affirm district court discretion, its dictum regarding closer review by appellate courts for certain policy disagreements reveals the Court's unwillingness to treat the Guidelines as truly advisory.

The suggestion that closer review may sometimes be appropriate also raises Sixth Amendment problems. While the *Kimbrough* Court did not state that district courts would be reversed in such situations, the mere fact that

---

Court has said the Guidelines must be and are *advisory*. Our substantive review of district court sentences accordingly must be limited. Otherwise, the term 'advisory' will lose all meaning, and the Sixth Amendment problem with the Guidelines will persist.").

144. As I have previously explained:

> De novo appellate review of substantive sentencing policy determinations would functionally reinstate the mandatory system condemned in *Booker* because it would inevitably result in binding legal rules defining sentencing ranges. Deferential review largely avoids this problem. Instead of being called upon to articulate rules about the appropriate sentencing range for particular crimes, courts of appeals simply evaluate whether a policy determination by the district court is reasonable. Holding that a particular determination is reasonable does not make that determination binding. The approval of one district court's policy as reasonable does not mean that other district courts, or even the same district court, must apply that same policy in the future to similar cases.

Hessick & Hessick, *supra* note 6, at 30–31.

145. *Id*. at 29.

146. *Gall* provides another example. As I have previously noted:

> [A]t the same time it purported to reject proportionality review, the [*Gall*] Court stated that, "[I]t [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one." The Court made no effort to resolve the tension between this statement—which encourages substantive appellate review of sentences outside the Guidelines range—and the Court's holding—which suggested that appellate courts should defer to district court determinations.

Id. at 34 (quoting *Gall*, 552 U.S. at 50).

appellate courts will look more closely at those district court decisions that disagree with Commission policy determinations may ultimately serve to elevate the now-advisory Guidelines, in practice, to mandatory or binding authority on district courts. As Fred Schauer has explained, optional (i.e., advisory) authorities, over time, are sometimes transformed into mandatory ones. He gives the example of citation conventions:

> Although the Tenth Circuit would be doing nothing wrong by failing to cite to the Second Circuit in a securities case, the failure to cite to the most prominent court on securities matters would likely raise some eyebrows. And the higher the eyebrows are raised, the more that what is in some sense optional is in another sense mandatory. The more there is an expectation of reliance on a certain kind of authority, the more an authority passes the threshold from optional to mandatory.[147]

In telling district courts that they will be subject to closer review—appellate eyebrows will be raised—if they deviate from the Guidelines, the Court has indicated that the Guidelines are in some sense mandatory authority for district courts. In other words, if this dictum from *Kimbrough* creates an "expectation of reliance" on the Guidelines, then they are no longer truly advisory.[148]

Although the aforementioned methods for promoting district court compliance with the Guidelines each appear to raise Sixth Amendment concerns, there may be an alternative method that would promote sentencing uniformity without limiting district court discretion (and thus without raising Sixth Amendment concerns): Convince district courts that a within-Guidelines sentence actually achieves the goals of sentencing in a particular case. So long as a district court elects to impose within-Guidelines sentences because the judge believes that the specific Guidelines range is premised on proper policy considerations and provides an appropriate sentence in that case, then that court will impose a sentence that furthers uniformity without implicating the Sixth Amendment.

This approach may not seem particularly revolutionary—indeed, the Supreme Court's repeated exaltations of the Guidelines and the Commission likely represent efforts by some Justices (notably Justice Breyer) to encourage district courts to impose within-Guidelines sentences. While it is compatible with Sixth Amendment principles to attempt to persuade district courts to sentence within the Guidelines, the manner in which the Court has sought to

147. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1958 (2008).

148. *See id.*

persuade district courts to impose within-Guidelines sentences is problematic.

The Court occasionally implies that district courts ought to impose Guidelines sentences because of the institutional advantages the Commission enjoys. This suggestion is implicit when the Court describes the Commission's process for developing and revising the Guidelines in a laudatory fashion,[149] or when it seeks to reassure district courts that the Guidelines—in light of Congress's direction to the Commission—"reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."[150] In each of these instances, the Court is attempting to persuade district courts to impose within-Guidelines sentences. It attempts to do so by insisting that the Commission, as an institution, is in the best position to make decisions about generally applicable sentencing policy.[151] But these attempts at persuasion based on institutional strengths are appeals to authority, and thus raise Sixth Amendment problems. This is because, if a district court were to impose a within-Guidelines sentence merely because the Guidelines were written by the Sentencing Commission, it would be no different than presuming that a Guidelines sentence is correct, which the Court has repeatedly explained is not permissible.[152] District courts cannot simply defer to the Commission and its Guidelines[153]—that is, they cannot treat the Guidelines as authoritative.[154]

While attempting to convince district courts to impose within-Guidelines sentences based on their source (i.e., the Commission's expertise) runs into Sixth Amendment concerns, an attempt to convince based on the Guidelines'

149. *See supra* note 57.

150. Rita v. United States, 551 U.S. 338, 350 (2007).

151. *See id*. at 348–50; *Gall*, 552 U.S. at 46; *see also* United States v. Jones, 531 F.3d 163, 173 n.7 (2d Cir. 2008) (quoting Kimbrough v. United States, 552 U.S. 85, 109 (2007)) ("*Kimbrough* and *Gall* both emphasize that, after *Booker*, the Guidelines' claim on judicial respect derives from the fact that the Sentencing Commission 'has the capacity courts lack' to frame Guidelines on the basis of 'empirical data and national experience, guided by a professional staff with appropriate expertise.'").

152. *See* cases cited *supra* note 141 and accompanying text.

153. *See* Nelson v. United States, 129 S. Ct. 890 (2009). *But see Rita*, 552 U.S. at 357 ("Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case, and that the judge has found that the case before him is typical."); Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OHIO ST. J. CRIM. L. AMICI: VIEWS FROM THE FIELD (Jan. 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Lynch-final-12-28-07.pdf ("[T]he Commission's advantage is in weighing broad social policy, and responsiveness to democratic political opinion. I should, I believe, give them deference as to the appropriate starting point or typical sentence for the average or typical instance of a given crime.").

154. Such deference would be based on the status of the institution that promulgated the Guidelines rather than an independent evaluation of the content of the Guidelines. "[T]he characteristic feature of authority is its *content-independence*. The force of an authoritative directive comes not from its content, but from its source." Schauer, *supra* note 147, at 1935.

content raises no such problems. A district court judge sentences based on content rather than authority if she is convinced the substantive reasons underlying a particular Guideline are appropriate and thus she elects to impose a within-Guidelines sentence. Persuasion based on content raises no Sixth Amendment problems because it still requires the sentencing judge to evaluate the Commission's reasoning and reach her own independent conclusion about the strength of that reasoning.[155] In sum, if a district court is persuaded by the Commission's reasoning that the Guideline sentence is appropriate, then uniformity is likely to be achieved while preserving district court discretion.

Attempting to persuade district courts to impose within-Guidelines sentences based on the content of the Guidelines would require some heretofore uncharacteristic behavior from the Commission. The Commission would have to reinvent itself as an institution designed to persuade district courts rather than to dictate to them.[156] Prior to *Booker*, the Commission rarely reacted to district court decisions imposing below-Guidelines sentences by promulgating a new Guideline or policy statement that approved of such sentencing reductions.[157] Instead, the Commission would promulgate Guidelines or policy statements designed to eliminate district court authority to reduce sentences in such situations.[158] And despite repeated comments by

---

155. As Fred Schauer has explained:

> A judge who is genuinely persuaded by an opinion from another jurisdiction is not taking the other jurisdiction's conclusion as authoritative. Rather, she is *learning* from it, and in this sense she is treating it no differently in her own decisionmaking processes than she would treat a persuasive argument that she has heard from her brother-in-law or in the hardware store. Conversely, the judge who decides to treat a decision from another jurisdiction as worthy of following because of its source and not its content is treating it as authoritative and need not be persuaded by the substantive reasons that might have persuaded the court that reached that decision.

Id. at 1943–44.

156. *Cf*. MICHAEL TONRY, SENTENCING MATTERS 12 (1996) ("Some judges use words like arrogant and hostile to describe the commission's attitude to the federal judiciary.").

157. One notable exception to this general practice concerns aberrant behavior. Initially fashioned by courts out of little more than a passing reference in the Federal Sentencing Guideline Manual, the Commission subsequently recognized that if an offense constituted "aberrant behavior" by the defendant, then a downward departure may be appropriate. *See* Rachel A. Hill, *Character, Choice, and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975, 977 (1998); U.S. SENTENCING GUIDELINES MANUAL § 5K2.20 (2008); *see also* United States v. Mikutowicz, 365 F.3d 65, 79 (1st Cir. 2004).

158. *See* Christina Chiafolo Montgomery, *Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines*, 20 NEW ENG. J. CRIM. & CIV. CONFINEMENT 27, 37–43 (1993); Jean H. Shuttleworth, *Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission*, 46 VAND. L. REV. 1333, 1344–45 (1993); TONRY, *supra* note 156, at 77.

judges that the Guidelines ranges are too harsh,[159] the Commission's amendments to the Guidelines have—with few exceptions[160]—largely increased those ranges.[161]

In addition to historically ignoring the disagreement of district court judges, the Commission has not made a serious effort to provide the reasoning behind its Guideline decisions to district courts.[162] For example, as I have noted elsewhere, in response to a number of court decisions awarding sentence reductions for a defendant's prior good acts, the Sentencing Commission adopted a Guideline stating that "[m]ilitary, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining" whether to impose a sentence outside the Guideline range.[163] The Commission never provided an official explanation for this new Guideline, and the Commission chairman and general counsel later published a law review article stating baldly that the Guideline was promulgated because courts were granting such departures despite the "'Commission['s] intent that departures based on offender "good citizen" characteristics rarely would be appropriate.'"[164] In other words, the

159. *See, e.g.*, Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("[T]he compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward."); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 736 (2005) (noting that "[p]rosecutors realize that many judges think the Guidelines are too harsh, especially for white collar and drug cases"); Lynch, *supra* note 153, at 4 ("I suspect that a large number, perhaps a majority, of judges believe that the overall sentencing pattern of the guidelines is excessively severe."); *see also* TONRY, *supra* note 156, at 99 (noting "the widespread hostility of judges and lawyers to the federal sentencing guidelines," and also noting that "[t]he core objections are that the guidelines are too rigid and too harsh").

160. One recent exception is the Commission's amendment to the crack cocaine Guideline. *See* Kimbrough v. United States, 552 U.S. 85, 100 (2007) (describing the 2007 Guideline amendment that "reduces the base offense level associated with each quantity of crack by two levels" and "yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder") (citing Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,571–72 (2007)).

161. *See* Adelman & Deitrich, *supra* note 65, at 578 ("[S]ince enacting the original Guidelines, the Commission has amended many of them, making them even more severe."); *see also* STITH & CABRANES, *supra* note 14, at 64 ("As both Congress and the Commission subsequently provided for increased sentence severity for a variety of crimes, the Commission's modest estimate in 1987 of the impact of the Guidelines on total federal prison population quickly became out-dated.").

162. *See* Adelman & Deitrich, *supra* note 65, at 580 (noting that an examination of a particular Guideline "will generally find that the guideline in question is based on neither past practice nor Commission expertise and that the Commission has never persuasively justified it," and that "neither the [Guidelines] manual nor the several other sources that may potentially contain useful information are likely to include any material relating to the merits of the guideline").

163. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2008).

164. *See* Hessick, *supra* note 66, at 1120–21 (quoting William W. Wilkins, Jr. & John R. Steer,

Commission decided that it did not think certain mitigating factors were appropriate, and so it promulgated a Guideline essentially forbidding district courts from reducing sentences on that basis *without ever explaining why* the Commission believed the mitigating factors to be inappropriate.

That the Commission largely elects not to provide reasons for its Guideline decisions is likely attributable to Congress's decision not to subject the Commission to those portions of the Administrative Procedure Act that require agencies to explain their decisions.[165] While *Booker* did not add a *statutory* requirement to provide explanations, it certainly appears to have altered the practical effect that such explanations would have. Now that district courts are free to disregard the Guidelines—including the policy judgments contained therein—the Commission has an incentive to provide such explanations in an attempt to convince district judges that a Guidelines sentence is appropriate. In other words, if post-*Booker*, the Commission were to respond to sentencing decisions by promulgating a Guideline stating that certain mitigating factors were inappropriate, district courts now have the discretion to disagree with that Guideline and reduce defendants' sentences. But if the Commission were to explain *why* it believes those mitigating factors to be inappropriate, then it might convince (at least some) district courts not to reduce sentences on those grounds. In endeavoring to provide such an explanation, the Commission may ultimately decide to revise those Guidelines that are the subject of repeated district court disagreement[166]—an action that would also help to promote uniformity.

Of course, using persuasion rather than appellate review or other limits on district court discretion will necessarily allow some district courts to sentence outside of the Guidelines. Under this proposal if, after reading the Commission's explanation for a particular Guideline, a district judge remains unconvinced that a Guidelines sentence is appropriate, then the judge is free to impose a non-Guidelines sentence. The proposal does not provide for substantive appellate review of such district court sentencing decisions, and so non-Guidelines sentences will not be reversed. But the fact that district courts will possess essentially unreviewable power to make sentencing decisions[167] does not necessarily mean that sentencing uniformity would, in practice, be diminished. Indeed, if the Commission were to either justify or revisit its

---

The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity, 50 WASH. & LEE L. REV. 63, 84 n.107 (1993)).

165. STITH & CABRANES, *supra* note 14, at 40, 208–09 n.20.

166. For example, "many judges . . . disapprove of guideline[] provisions that forbid judges at sentencing to take account of personal circumstances . . . ." TONRY, *supra* note 156, at 83.

167. Of course, pre-Guidelines limitations on such power—e.g., prohibitions on sentencing based on race, *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994), or based on material misinformation, *Townsend v. Burke*, 334 U.S. 736 (1948)—would still apply.

more controversial Guidelines, then it may find that there is more district court uniformity than reasonableness review by appellate courts can afford.

Several commentators have suggested that the Commission, in the wake of *Booker*, engage in a dialogue with district court judges and revise the Guidelines.[168] The Commission's recent work revising the crack/powder cocaine disparity suggests that the modern Commission might be more amenable to such a suggestion.[169] If the Commission were to adopt such an approach with respect to other Guidelines, then the Guidelines amendments would actually reflect "national experience," as the Court in *Kimbrough* asserted the Guidelines do.[170] That dialogue and subsequent revisions might promote uniformity without curtailing district court discretion (and thus without raising Sixth Amendment problems) is yet another reason for the Commission to continue down the path of revising the Guidelines. If revisions were coupled with reasoned explanations of particular policy decisions, we might also ultimately find ourselves with a federal sentencing system that is perceived to be fair and sensible, as well as uniformly applied.

VI. CONCLUSION

The Court's decision in *Kimbrough* was designed to clarify uncertainty

---

168. As Judge Nancy Gertner has suggested, the Commission should

> continue to reexamine the Guidelines as it has done so well with the crack Guidelines. It could look at those Guidelines that courts are having problems with and reconsider them. That was the way the system was supposed to work: sentencing departures by trial judges would highlight the area in which Guideline change was needed. It could begin to provide real findings for the Guidelines, rather than the cursory explanations. . . . In short, the Commission could effectively redesign its mission as buttressing and supporting judicial discretion and not just blocking it.

Nancy Gertner, Gall, Kimbrough *and Me*, OHIO ST. J. CRIM. L. AMICI: VIEWS FROM THE FIELD 5–6 (Jan. 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Final2-Gertner-edit-1-18-08.pdf. For another example, see Michael S. Tunink, *A New Role for the United States Sentencing Commission in Post-*Booker *Sentencing: Reflecting Judicial Practice*, 40 ARIZ. ST. L. J. 1429, 1430, 1442–49 (2008) (suggesting that the Commission "develop a framework that establishes a dialogue between the Commission and the judiciary by incorporating departures and variances as amendments to the Guidelines in an attempt to reflect current judicial sentencing practice [and that] the Commission should further cultivate judicial compliance by articulating the specific penalogical reasons for the existing Guidelines and for each subsequent amendment to the Guidelines"). *Cf.* TONRY, *supra* note 156, at 90 (recommending pre-*Booker* that the Commission revisit its policy decisions and fashion guidelines "that would reduce sentencing disparities but not routinely require judges to impose sentences that they consider unjust").

169. *See supra* note 160 and accompanying text.

170. Kimbrough v. United States, 552 U.S. 85, 109 (2007); *see also* Tunink, *supra* note 168, at 1430 (arguing that if the Commission began "incorporating departures and variances as amendments to the Guidelines in an attempt to reflect current judicial sentencing practice," then it will result in a sentencing system "arguably closer to that envisioned by the drafters of the SRA than that which existed before *Booker*").

surrounding the new form of appellate sentencing review established in *Booker*. It appears, however, that *Kimbrough* may have actually resulted in more appellate uncertainty. Some of this uncertainty is attributable to the Court's dicta suggesting the level of appellate scrutiny of district court disagreement with Guidelines' policy may depend on whether a particular Guideline is the product of "empirical data and national experience."[171] But, even without such dicta, appellate review of district court sentencing decisions is likely to occur differently in different circuits. That is because the *Booker* remedy—solving the Sixth Amendment problem by restoring district court discretion while, at the same time, seeking to preserve some adherence to the Guidelines through appellate review—is internally inconsistent and thus inherently unstable.[172] Some circuits are inevitably going to prioritize one facet of the *Booker* remedy over the other, and thus circuit conflict is likely to continue.

Because appellate review is fundamentally at odds with the concept of district court discretion, this Article proposes appellate review is not the best way to promote uniform sentencing. Instead, it proposes that the Commission attempt to persuade district courts that the policy decisions underlying the Guidelines are correct. To do so, the Commission will have to articulate its reasoning for particular decisions. The Commission may also have to revise those Guidelines that are the subject of widespread district court disapproval. If district courts were to impose within-Guidelines sentences because they were convinced such sentences were just, then we might attain not only sentencing uniformity, but also a sentencing system that is perceived as fair. And that would be a real accomplishment for federal sentencing.

171. *Kimbrough*, 552 U.S. at 109.

172. *See* Hessick & Hessick, *supra* note 6, at 33.